Immigration Consequences of Criminal Conduct — The Basics

by John Crossett

I. Immigration Consequences of Criminal Convictions

Criminal convictions can affect an alien's immigration status in three significant ways:

A. As grounds for removal.

- The criminal grounds of *inadmissibility* – INA § 212(a)(2).
- The criminal grounds of *deportability* – INA § 237(a)(2).

B. As grounds for denial of relief or protection from removal.

- Some convictions *require* mandatory denial of relief; others *permit* discretionary denial.

C. As grounds for detention.

- Some convictions trigger *mandatory* detention without a bond hearing under INA § 236(c).

II. Categories of Crimes Triggering Immigration Consequences

Not all convictions trigger immigration consequences. However, the overlapping categories of crimes which **do** trigger such consequences include:

A. Crimes Involving Moral Turpitude ("CIMT") – INA §§ 212(a)(2)(A)(i)(I) and 237(a)(2)(A)(i).

B. Controlled Substance Violations – INA §§ 212(a)(2)(A)(i)(II) and 237(a)(2)(B)(i).

- To trigger immigration consequences, a drug offense must have involved a substance that is *Federally* controlled. *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015).

C. Aggravated Felonies – INA § 237(a)(2)(A)(iii) and defined at INA § 101(a)(43).

D. Crimes of Domestic Violence or Child Abuse – INA § 237(a)(2)(E)(i).

E. Firearm Offenses – INA § 237(a)(2)(C).

III. The Meaning of "Conviction"

Statutory Text—INA § 101(a)(48)(A) provides as follows:

The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—

> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
>
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

IV. Interpreting Key Phrases Within INA § 101(a)(48)(A)

A. "formal judgment of guilt entered by a court"

i. Judgment of guilt must be a "true criminal judgment" entered in "true criminal proceedings."

a. Conviction exists where the judgment of guilt was entered by a:

- General court martial. *Matter of Rivera-Valencia*, 24 I&N Dec. 484 (BIA 2008).
- Municipal court. *Matter of Cuellar*, 25 I&N Dec. 850 (BIA 2012); *but see Castillo v. Att'y Gen. of U.S.*, 729 F.3d 296 (3d Cir. 2013).

b. Conviction does **NOT** exist where judgment of guilt was entered:

- In a State "violation" proceeding in which the prosecution was not required to prove guilt beyond a reasonable doubt. *Matter of Eslamizar*, 23 I&N Dec. 684 (BIA 2004).
- In a juvenile delinquency proceeding. *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000). *** NOTE:** Juvenile "convictions" differ from juvenile delinquency adjudications. *Matter of V-X-*, 26 I&N Dec. 147 (BIA 2013).

c. A conviction entered by a foreign court supports a removal charge **ONLY** if the offense of conviction defines conduct which is deemed criminal by United States standards. *Matter of McNaughton*, 16 I&N Dec. 569, 572 (BIA 1978).

ii. Finality of Convictions

- *Matter of J.M. Acosta*, 27 I&N Dec. 420 (BIA 2018) – Addressing circuit split, BIA holds that a conviction does not attain a sufficient degree of finality for immigration purposes until the right to direct appellate review on the merits of the conviction has been exhausted or waived.

    - Presumption: A formal judgment of guilt entered by a court is *presumed* to be a final "conviction" once the convicting jurisdiction's appeal filing deadline has passed.

    - Rebutting the presumption: The presumption can be rebutted if the respondent proves that appeal: **(1)** was timely filed under the law of the convicting jurisdiction (including any extensions granted by that jurisdiction's courts); and **(2)** relates to the issue of guilt or innocence or concerns a substantive defect in the criminal proceedings.

    - Appeals unrelated to the substantive merits of the judgment of guilt (e.g., appeals challenging only the sentence or the severity of immigration consequences) do not prevent the judgment of guilt from achieving finality.

B. "if adjudication of guilt has been withheld"—Rehabilitative/Diversionary Dispositions

i. "a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt"

a. **BIA** holds that a "conviction" exists even if the adjudication of guilt has been "deferred" or "withheld." *Matter of Punu*, 22 I&N Dec. 224 (BIA 1998) (deferred adjudication under Texas law).

a. **Circuit Courts of Appeals** generally agree.

- *See, e.g.*, *Madriz-Alvarado v. Ashcroft*, 383 F.3d 321, 330 (5th Cir. 2004) (holding that deferred adjudication granted to alien under Texas law for possession of LSD was a "conviction" under INA § 101(a)(48)(A)).

- *But see Crespo v. Holder*, 631 F.3d 130 (4th Cir. 2011) (finding no "conviction" where Virginia statute allowed sentencing court to *find* "sufficient facts to warrant a finding of guilt" but did not require defendant to *admit* such facts).

ii. "the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed"—The following have been held to qualify as a punishment, penalty, or restraint on liberty:

a. Incarceration and monetary penalties (e.g., fines or restitution). *See, e.g.*, *DeVega v. Gonzales*, 503 F.3d 45, 49 (1st Cir. 2007).

- *But see Retuta v. Holder*, 591 F.3d 1181, 1185-88 (9th Cir. 2010) (finding that suspended fine is not a penalty "ordered . . . to be imposed"; *Retuta* also questions (but does not decide) whether mandatory compliance with a diversion program qualifies as a "restraint on liberty.")

b. Probation. *Matter of Punu*, 22 I&N Dec. at 228; *see also United States v. Medina*, 718 F.3d 364, 368 (4th Cir. 2013).

c. Requirement to pay court costs and surcharges. *Matter of Cabrera*, 24 I&N Dec. 459 (BIA 2008).

d. Pretrial agreement to submit to community supervision, pay fees and restitution, perform community service, and abide by a "no contact" order. *Matter of Mohamed*, 27 I&N Dec. 92 (BIA 2017).

V. Proving the Existence of a "Conviction" in Immigration Proceedings

A. **CAVEAT:** There is a difference between the types of evidence and documents which are used to prove that a conviction **exists** and the evidence and documents used to identify **the elements of a divisible offense**.

B. Alien's formal **admission** of a conviction alleged in the NTA is sufficient to prove the conviction's existence without additional evidence. 8 C.F.R. § 1240.10(c); *Matter of Velasquez*, 19 I&N Dec. 377, 382 (BIA 1986); *Perez-Mejia v. Holder*, 663 F.3d 403, 410 (9th Cir. 2011); *Roman v. Mukasey,* 553 F.3d 184, 187 (2d Cir. 2009) (per curiam); *Fequiere v. Ashcroft* 279 F.3d 1325, 1327 (11th Cir. 2003).

C. When conviction is **not admitted**, INA §§ 240(c)(3)(B)-(C) and 8 C.F.R. § 1003.41 list the kinds of documents that may be used to prove a conviction.

- *Copies* of such documents need to be authenticated, but the method of authentication is flexible. *Matter of J.R. Velasquez*, 25 I&N Dec. 680 (BIA 2012).

VI. Vacatur and Modification of Convictions

A. Collateral Attack: A pending collateral attack does not affect the validity of a conviction for immigration purposes; further, EOIR does not entertain collateral attacks on convictions in removal proceedings. *Matter of Adetiba*, 20 I&N Dec. 506, 508 (BIA 1992). IJs need not adjourn or administratively close removal proceedings to await the results of such collateral attacks.

B. Full Faith and Credit: In general, EOIR gives "full faith and credit" to judgments vacating or modifying convictions. *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000).

C. Rehabilitative Vacatur and/or Modification: Conviction vacated or modified for rehabilitative purposes or to ameliorate immigration hardships remains effective for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003) (to ameliorate immigration hardships); *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1998) (for rehabilitative purposes).

D. Vacatur Due to Defect in the Underlying Criminal Proceeding: It is important to distinguish between vacatur to **ameliorate immigration hardships** and vacatur based on a **failure to advise the alien of the immigration consequences of his or her conviction**.

i. A conviction vacated due to a substantive or procedural defect is invalid for immigration purposes. *Matter of Pickering*, 23 I&N Dec. at 624 (finding that there is "a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships"); *see also Matter of Marquez Conde*, 27 I&N Dec. 251 (BIA 2018).

ii. Conviction is invalid for immigration purposes if vacated due to failure of the sentencing judge or defense counsel to advise defendant of possible immigration consequences of a guilty plea. *Matter of Adamiak,* 23 I&N Dec. 878, 881 (BIA 2006). *See also Padilla v. Kentucky*, 559 U.S. 356 (2010).

► EOIR does **NOT** review state court decisions vacating or modifying convictions for legal or factual "correctness"—absent a jurisdictional defect, even decisions that are *erroneous* under state law are entitled to full faith and credit.

E. Burden of Proof: There is a **split** among circuits and between the circuits and the BIA with regard to who bears the burden of proving why a conviction was vacated or modified.

- *Compare Matter of Chavez*, 24 I&N Dec. 272, 274 (BIA 2007) (concluding that an alien seeking to reopen proceedings to establish that a conviction has been vacated bears the burden of proving that the conviction was not vacated solely for immigration purposes), *and Rumierz v. Gonzales*, 456 F.3d 31 (1st Cir. 2006) (same conclusion in the reconsideration context), *with Nath v. Gonzales*, 467 F.3d 1185, 1189 (9th Cir. 2006) (concluding that the DHS bears the burden of proving that a

conviction remains valid, even in the context of a motion to reopen), *and Pickering v. Gonzales*, 465 F.3d 253, 269 (6th Cir. 2006) (holding that the DHS bears the burden of showing that the alien's conviction was quashed for rehabilitative reasons or reasons related to his immigration status).

F. Pardons: Under INA § 237(a)(2)(A)(vi), a conviction with respect to which the defendant received a "full and unconditional pardon" from the President or a State Governor cannot be used to support CIMT or AGFEL *deportability* charges. *Matter of Suh*, 23 I&N Dec. 626 (BIA 2003).

i. **CAVEAT:** Pardoned convictions remain effective for **inadmissibility** purposes and also for purposes of deportability arising under grounds **other than** CIMT and AGFEL—e.g., controlled substance, firearms, crime of domestic violence, or crime of child abuse. *Aguilera-Montero v. Mukasey*, 548 F.3d 1248, 1251-52 (9th Cir. 2008); *Balogun v. U.S. Att'y Gen.,* 425 F.3d 1356, 1358 (11th Cir. 2005).

ii. To be effective, a pardon must be "executively, as distinguished from legislatively, conferred." *Matter of Nolan*, 19 I&N Dec. 539, 541 (BIA 1988). Typically, this means the pardon must be issued by a State Governor (as the statutory text specifies). However, some states vest supreme pardoning authority in executive bodies other than the Governor, such as the Georgia State Board of Pardons and Paroles. The BIA has held that full and unconditional pardons issued by such bodies are to be given the same effect for immigration purposes as if the pardon had been issued by the Governor. *Matter of Tajer*, 15 I&N Dec. 125, 126 (BIA 1974).

iii. To be "full and unconditional," a pardon "must obliterate any future legal consequences flowing from the underlying adjudication of guilt and must not be dependent upon the fulfillment of any condition." *Matter of Nolan*, 19 I&N Dec. at 541. Thus, a pardon is not "full and unconditional" if the defendant continues to lack gun rights. *Castillo v. Att'y Gen. of U.S.*, 756 F.3d 1268, 1274-76 (11th Cir. 2014).

VII. Sentencing issues

A. **Statutory Text**—INA § 101(a)(48)(B) provides:

> Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

i. Effect of the Suspension of a Sentence: Where a court sentences a defendant to a particular prison or jail term, that term controls even if the court *suspends* imposition or execution of that sentence in whole or in part, and even if the

defendant was released before that full term was served. *Matter of Batista,* 21 I&N Dec. 955, 963 (BIA 1997).

ii. Indeterminate Sentences: A sentence to an indeterminate term of imprisonment (e.g., to a term "not to exceed 5 years") is treated as a sentence for the longest permissible term. *Matter of S-S-*, 21 I&N Dec. 900, 902-03 (BIA 1997).

iii. Incarceration as Condition of Probation: The term of imprisonment includes periods of incarceration or confinement imposed as a condition of probation or upon revocation of probation, parole, or supervised release. *Matter of Calvillo Garcia*, 26 I&N Dec. 697 (BIA 2015); *Matter of Perez Ramirez*, 25 I&N Dec. 203 (BIA 2010); *see also Hernandez v. Holder*, 760 F.3d 855, 859-61 (8th Cir. 2014). *Cf. United States v. Mendoza-Morales*, 347 F.3d 772, 774 (9th Cir. 2003).

B. Vacatur or modification of sentences. A sentencing modification is given effect **even if** the sentence was modified solely for rehabilitative purposes or to alleviate immigration hardships. *See Matter of Cota*, 23 I&N Dec. 849 (BIA 2005).

VIII. Criminal Removal Grounds Not Requiring a "Conviction"

A. INA § 212(a)(2)(A)(i)—no conviction required to support inadmissibility charges based on a CIMT or controlled substance violation when respondent "admits having committed, or . . . admits committing acts which constitute the essential elements of" such offenses. *Matter of J-*, 2 I&N Dec. 285, 287-88 (BIA 1945), as modified by *Matter of E-V-*, 5 I&N Dec. 194, 196 (BIA 1953).

B. INA § 212(a)(2)(C)—no conviction required to support an inadmissibility charge based on a consular or immigration officer's **"reason to believe"** that the respondent "is or has been" an illicit drug trafficker. *Matter of Rico*, 16 I&N Dec. 181, 184 (BIA 1977); *Alarcon-Serrano v. INS*, 220 F.3d 1116, 1119 (9th Cir. 2000). In unpublished cases, the BIA treats "reason to believe" as generally equivalent to "probable cause."

C. INA § 237(a)(2)(E)(ii)—no conviction required where respondent violated a qualifying domestic violence protection order. *Matter of Obshatko*, 27 I&N Dec. 173 (BIA 2017).